TETUAN ETIQA GENERAL TAKAFUL BHD v. PRABU PERMALOO & ORS

HIGH COURT MALAYA, SUNGAI PETANI
CHAN JIT LI J
[CIVIL APPEAL NO: KB-11A-5-12-2020]
12 DECEMBER 2021

Abstract – *A motor vehicle insurance is meant to protect its owner from any claim that arises from road traffic accident, but such claims must be made in compliance with the laws. Where the claim is tainted by fraud, the insurer, whose legal interest is in jeopardy, ought to be allowed to intervene as such intervention would also work towards avoiding duplicity in relation to the same action.*

CIVIL PROCEDURE: *Intervener – Legal interest – Application for leave to intervene – Insurer uncovered evidence of fraud in happening of accident – Whether insurer's legal interests compromised if intervention not allowed – Whether fraud could only be established through witnesses to accident – Whether leave to intervene ought to be granted – Rules of Court 2012, O. 15 r. 6*

The third respondent, Jiwaneswary, instituted a civil action at the Magistrate Court, pleading that she was riding a motorcycle when she was collided into by the driver of a motorcar, the first respondent, purportedly as the agent/employee of the second respondent, the registered owner of the car. The car was insured by the appellant, Tetuan Etiqa General Takaful Bhd ('Etiqa'). Messrs Agusti, Ismadi & Karu were appointed as solicitors for both the first and second respondents at the Magistrate Court. Before the date of hearing, Etiqa, *vide* encl. 10, sought leave to intervene in the action pursuant to O. 15 r. 6 of the Rules of Court 2012. However, the application was dismissed by the Magistrate and hence, this appeal. In its affidavit-in-support, Etiqa averred that the leave to intervene was sought as it transpired that the adjusters appointed by Etiqa had uncovered evidence of fraudulent collusion between the three respondents and that the car insured by Etiqa was, in fact, not involved in the collision. Counsel for the first and second respondents, Ahmad Tanzil ('Tanzil'), did not object to encl. 10, although counsel for Jiwaneswary objected against it.

Held (allowing appeal with costs):

(1) Etiqa should be permitted to intervene in the Magistrate Court action. If Etiqa's suspicion of the fraudulent collusion were indeed true, then it was most likely that the first and second respondents would not, at the trial, raise the issue pursued by Etiqa which was that the car was not involved in the third respondent's accident. There was no way in which Tanzil could safeguard Etiqa's interests as his primary duty was to the

first and second respondents and not to Etiqa. Even if Tanzil were to find that there was evidence at the trial to show that there was fraudulent claim of collusion between the respondents, he was legally estopped from cross-examining his own witnesses. In that light, it was clear that Etiqa's legal interest would be severely compromised if it was not allowed to intervene at the trial. (paras 28-30)

(2) A distinction must be made in an instance in which the insurer alleged that it was not liable under the insurance policy on the grounds that, had it not been for the fraud perpetuated against it, it would not have issued the policy. Under such circumstance, the proper mode for the insurer to move the court would be to file a writ or an originating summons to seek a declaration to nullify the policy. The action should be separate as the witnesses to be called to establish the fraud would constitute of witnesses who are not acquainted to the facts of the collision. However, in the instant action, the insurer, while conceding that there was a valid policy subsisting, sought to avoid liability on the grounds that there was a fraud in relation to the happening of the accident. Etiqa could only establish the purported fraud through the witnesses to the collision. If Etiqa was not permitted to intervene in the trial, Etiqa would have to file a fresh action against the same parties which would result in a multiplicity/duplicity of actions apart from incurring extra costs to the parties. (paras 36 & 37)

(3) Further, excessively high burden of proof was erroneously imposed on Etiqa in an O. 15 application when the Magistrate dismissed encl. 10. The issue of whether or not there was evidence of the fraud should be determined at the conclusion of the trial after an assessment of the witnesses' credibility had been made. Hence, there were compelling reasons for interference and the decision of the Magistrate was therefore set aside. The appellant was granted leave to intervene in the civil action. (paras 38-40)

Case(s) referred to:

Arab Malaysian Merchant Bank Bhd v. Dr Jamaludin Dato' Mohd Jarjis [1991] 2 CLJ 862; [1991] 1 CLJ (Rep) 19 SC ***(foll)***

Badruzamani Azmi v. Kurnia Insurans (M) Bhd [2001] 4 CLJ 280 HC ***(dist)***

Carpenter v. Ebblewhite & Ors [1939] 1 KB 347 ***(dist)***

Gurtner v. Circuit [1968] 2 QB 587 ***(refd)***

Johannes Koplan v. Aw Chen [1970] 1 LNS 42 FC ***(foll)***

Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd [1992] 1 CLJ 20; [1992] 1 CLJ (Rep) 150 SC ***(refd)***

Pacific & Orient Insurance Company Bhd v. Arnanda Soria Demadu [2021] 1 CLJ 523 CA ***(dist)***

Pegang Mining Co Ltd v. Choong Sam & Ors [1968] 1 LNS 96 ***(foll)***

Public Bank Bhd v. Nikseng Development Sdn Bhd [1997] 3 CLJ 381 CA ***(refd)***

Tajjul Ariffin Mustafa v. Heng Cheng Hong [1993] 3 CLJ 117 SC ***(refd)***

Legislation referred to:
Road Transport Act 1987, s. 96(1), (3)
Rules of Court 2012, O. 15 r. 6

For the appellant - Tom Chin; M/s Zaid Ibrahim & Co
For the 1st & 2nd respondents - Ahmad Tanzil Mohamed Nasser; M/s Agusti Ismadi & Karu
For the 3rd respondent - Manoharan Veerasamy; M/s Mano Veera & Co

[Editor's note: Appeal from Magistrate's Court; Civil Action No: KB-A73KJ-175-02-2020]

Reported by S Barathi

JUDGMENT

Chan Jit Li J:

[1] This is an appeal against the decision of the learned Magistrate at Sungai Petani. The appellant, Tetuan Etiqa General Takaful Bhd (hereinafter referred to as "Etiqa"), had sought to intervene in civil action KB-A73KJ-175-2-2020 which had been instituted at the Sungai Petani Magistrate's Court by the third respondent, Jiwaneswary a/p Raman (hereinafter referred to as "Jiwaneswary").

[2] In her statement of claim, Jiwaneswary pleaded that she was riding a motorcycle bearing registration no. KEA 6260 at Jalan Lencong Timur on 9 May 2019 when she collided into by the driver of a motorcar bearing registration no. PFH 3246 (hereinafter refered to as "the car").

[3] At the time of collision, the second respondent, Thayalan a/l Permaloo, was the registered owner of the car but it was driven by the first respondent, Prabu a/l Permaloo, purportedly as the agent/employee of the second respondent. The car was insured by Etiqa.

[4] Messrs Agusti, Ismadi & Karu was appointed as solicitors for both the first and second respondents at the Magistrate's Court. The matter was initially set down for trial on 5 May 2020. However, due to the movement control order, the matter was adjourned to 9 July 2020. But, the hearing did not proceed on that date as Messrs Agusti, Ismadi & Karu had requested for an adjournment. A new trial date, 26 August 2020, was given. However, before the date of hearing, Etiqa instructed Messrs Zaid Ibrahim & Co to apply for leave to intervene.

[5] The application for leave which was made *vide* encl. 10 was dismissed by the learned Magistrate. This led to the instant appeal.

[6] The manager of Etiqa's Motor Vehicles Claims Unit, Ms Chung Suet Yeen @ Gladys, in affirming the affidavit-in-support, averred that Etiqa was seeking leave to intervene as it transpired that the adjusters appointed by Etiqa had uncovered evidence of fraudulent collusion between the three

respondents (Prabu, Thayalan and Jiwaneswary) and that the car insured by Etiqa was in fact not involved in the collision. The more material averments are found in paras. (8) and (11) of her affidavit reproduced below:

> 8. Namun demikian, saya menegaskan bahawa siasatan oleh Pemohon mendapati bahawa Defendan Pertama dan motokar bernombor pendaftaran PFH 3246 sebenarnya tidak terlibat di dalam kemalangan tersebut …
>
> 11. Saya dinasihati oleh peguam cara Pemohon dan menegaskan bahawa kedudukan Pemohon akan diprejudiskan jikalau permohonan ini tidak dibenarkan atas alasan seperti berikut:
>
> (a) Notis di bawah Seksyen 96 Akta Pengangkutan Jalanraya 1987 telah diserah ke atas Pemohon oleh peguam cara Plaintif iaitu tetuan Manoveera & Co. untuk membolehkan Plaintif menguatkuasakan sebarang perintah yang mungkin diperolehi oleh mereka di dalam tuntutan ini terhadap pemohon.
>
> (b) Menurut polisi-polisi dalam insurans yang diambil oleh Defendan bagi motokar no. PFH 3246, hak dan liabiliti Defendan-Defendan akan dipindah (subrogated) kepada Pemohon/Pencelah.
>
> (c) Kepentingan undang-undang dan komersial Pemohon akan terjejas jika Pemohon tidak dinamakan sebagai Defendan Ketiga dan diberikan peluang bagi membela tuntutan Plaintif ini kerana Pemohon perlu bertanggungjawab membayar ganti rugi kepada Plaintif menurut peruntukan di bawah Akta Pengangkutan Jalanraya 1987.
>
> (d) Pemohon akan dibebani dengan tekanan untuk menanggung segala perintah Mahkamah ini menurut Seksyen 96 Akta Pengangkutan Jalanraya 1987 manakala berdasarkan segala penegasan saya di atas, ianya adalah jelas bahawa motokar PFH 3246 yang dilindungi oleh polisi insurans yang dikeluarkan oleh Pemohon sebenarnya tidak terlibat dalam kemalangan jalanraya dengan plaintif pada 9.5.2019 jam lebih kurang 8.45 pagi. Tambahan pula, saya sesungguhnya menyatakan bahawa Pemohon perlu dijadikan satu pihak di dalam tindakan ini supaya pemohon dapat membela tindakan plaintif dan semua perkara-perkara yang dipertikaikan oleh pemohon dapat didengar dan diputuskan oleh Mahkamah Yang Mulia ini secara efektif dan dengan sepenuhnya.

[7] En Ahmad Tanzil bin Mohamed Nasser (hereinafter referred to as "En Tanzil"), learned counsel for the first and second respondents, has no objections to encl. 10.

[8] However, En Manoharan a/l Veerasamy (hereinafter referred to as "En Manoharan"), learned counsel for Jiwaneswary, the third respondent, objects against the application. He submits that the learned Magistrate was correct in dismissing Etiqa's application for several reasons. He contends,

firstly, that Etiqa has no *locus standi* to intervene at the stage of the trial at the Magistrate's Court action in view of *Badruzamani Azmi v. Kurnia Insurans (M) Bhd* [2001] 4 CLJ 280.

[9] The High Court in *Badruzamani (supra)* had clearly stated that, as the insurer's right to intervene is premised on its statutory liability under s. 96(1) of the Road Transport Act 1987, its right to intervene is contingent on the plaintiff/claimant securing a judgment against the defendant/tortfeasor (that is to say, the party liable in negligence). The facts in *Badruzamani* are somewhat similar to the instant appeal. That case involved a running down action in which the insurer, Kurnia Insurans (M) Bhd, was informed that there were grounds to believe that a collision between the plaintiff and defendant had not taken place. After lodging a police report, the insurer successfully obtained leave to intervene in the action at the lower court. Dissatisfied, the plaintiff appealed against the leave order. The appeal was allowed by the High Court. En Manoharan refers specifically to the following passage in *Badruzamani*:

> It is my considered opinion that a vehicle insurer's liability under s. 96(1) of the Act is a contingent statutory liability – a liability wholly and exclusively created by statute and contingent upon judgment obtained by the claimant. Thus, during the currency of the proceedings between the claimant and the insured, there are no issues – not even fraud – that could be pleaded or litigated until the strict liability provision under s. 96(1) is triggered into operation upon conclusion of the trial.
>
> Applying the above principles to the present case, it is my judgment that the respondent, as vehicle insurers, could not in law be made a party to the current action. … It would be absurd for Kurnia to be added as a party and to deliver a defence (as prayed for by Kurnia) when Kurnia is yet to be affixed with any liability in the case at hand.

[10] En Manoharan's second argument is that even though *Badruzamani* is a decision of a co-ordinate jurisdiction, this court is bound by *Badruzamani* as it was affirmed by the Court of Appeal.

[11] En Manoharan's third argument is that encl. 10 should be dismissed for it is procedurally wrong of Etiqa to seek an intervention at the trial court when it is evident that the proper procedure to be adopted was for Etiqa to file an originating summons at the High Court to secure a declaration that the insurance policy is void and unenforceable on grounds of fraud. In respect of this issue, En Manoharan referred me to *Pacific & Orient Insurance Co Bhd v. Arnanda Soria Demadu* [2021] 1 CLJ 523 where the Court of Appeal speaking through Mary Lim JCA (as she then was) held:

> The matter of fraud and such like complaints … were best taken in those proceedings where the matter may be properly and fully canvassed before the validity of the insurance policy may be determined. The tort claim before the Kulim Magistrate's Court was simply not where legislation had

A seen fit to try such issues; and logically so. The Sessions Court sits to adjudicate on the personal injury claim; as the matter of the validity of the policy had been carved out by s. 96(3) of the RTA to be determined by way of another legal process and in separate proceedings.

[12] Fourthly, En Manoharan submits that ultimately it is the third B respondent who has the right to choose which party she desires to sue and this right of election had been recognised by the Supreme Court in *Tajjul Ariffin Mustafa v. Heng Cheng Hong* [1993] 3 CLJ 117; [1993] 2 MLJ 143 where Edgar Joseph Jr SCJ delivering the judgment of the Supreme Court held at p. 144:

C A plaintiff cannot be forced upon the application of the defendant, to have a second defendant against whom he does not wish to proceed added, for the reason that the negligence of the intended second defendant is not an issue involved in the claim he has made and so he should be allowed to proceed against the defendant of his choice.

D It is En Manoharan's submission that to allow Etiqa to intervene would mean that the court was coercing the third respondent to take action against a party which the third respondent did not desire to and this runs contrary to *Tajjul Ariffin* (*supra*).

[13] Last but not the least, En Manoharan argues that encl. 10 should be E dismissed as Etiqa had failed to exhibit the adjustors report referred to and relied on by Etiqa. This omission is fatal for not only does it make Etiqa guilty of not making a full and frank disclosure, Etiqa had also failed to show merits in its application. As such, En Manoharan submits, the learned Magistrate's decision in dismissing encl. 10 should be affirmed.

F **[14]** It is evident from the grounds of judgment that the learned Magistrate accepted En Manoharan's arguments. She further took the view that Etiqa would suffer no prejudice even if Etiqa was not allowed to intervene and her reasoning appears as follows:

G [11] Mahkamah telah mempertimbangkan kesemua hujahan pihak pemohon dan mendapati keputusan mahkamah menolak permohonan pemohon untuk mencelah di dalam tindakan ini tidak akan sekali-kali memprejudiskan pihak pemohon, memandangkan kes ini belum lagi diputuskan sehingga selesai perbicaraan. Tambahan pula, pihak defendan pertama dan kedua di dalam pembelaannya telah menafikan sepenuhnya H penglibatan kenderaan motokar PFH 3246 di dalam kemalangan ini. Penafian tersebut jelas menunjukkan bahawa, hak pemohon tidak akan diprejudiskan dan keadilan di dalam perbicaraan tidak akan terjejas. Rujukan juga telah dibuat beberapa kes-kes yang telah diputuskan sebelum ini seperti *Badruzamani Azmi v. Kurnia Insurans (M) Bhd* [2006] 6 MLJ 481.

I

[15] The learned Magistrate also opined that there was no evidence of fraud to warrant Etiqa's intervention: A

> [13] Mahkamah berpendapat, hujahan dan alasan pemohon untuk mencelah kerana terdapatnya keraguan dan isu fraud dan terdapat ketidakselarian dalam laporan-laporan polis plaintif dan defendan, adalah tidak bermerit dan tidak berasas. Defendan pertama dan defendan kedua sendiri telah membuat laporan polis dan menyatakan bahawa mereka tidak terlibat dengan kemalangan yang dikatakan oleh plaintif. Defendan-defendan dengan jelas telah menafikan kenderaan PFH 3246 terlibat dalam kemalangan dengan motosikal KEA 6260 pada 9.5.2019 di dalam pernyataan pembelaan. Kes ini merupakan kes penafian penuh dan menjadi tanggungjawab plaintif untuk membuktikan tuntutannya. Mahkamah juga mendapati tiada sebarang isu-isu lain yang meragukan atau terdapatnya penipuan 'fraud' yang jelas yang dibangkitkan oleh pemohon. Permohon ini dibuat tidak berdasarkan pembuktian khusus. Laporan penyelaras yang dikatakan hasil siasatan penyelaras yang membangkitkan isu fraud juga tidak diekshibitkan di dalam permohonan ini untuk menerangkan apakah isu penipuan yang ingin dibangkitkan oleh pemohon. Maka jelas menunjukkan isu fraud yang dikatakan hanyalah kenyataan kosong semata-mata. B C D

[16] Apart from that the learned Magistrate made a finding that Etiqa's application *vide* encl. 10 lacked *bona fide* as there was a delay in the filing and this is reflected in para. 16 of her grounds of judgment reproduced below: E

> 16. Selain itu, Mahkamah juga berpendapat, kelewatan pihak pencelah dicadangkan yang melampau dalam memfailkan permohonan ini menjadikan permohonan ini tidak *bona fide* dan dikira sebagai waiver oleh pihak pencelah dicadangkan. Kelewatan melampau yang dimaksudkan ialah berkenaan pemfailan Notis permohonan ini yang hanya difailkan setelah pliding ditutup dan seminggu sebelum tarikh bicara kali yang ketiga ditetapkan. Kes ini didaftarkan pada bulan Februari 2020 dan defendan telah memasukkan kehadiran dan memfailkan pembelaan pada Mac 2020. Namun, defendan hanya memfailkan permohonan untuk mencelah pada bulan Ogos 2020 setelah 3 kali bicara ditetapkan. Mahkamah berpendapat, ini sememangnya menunjukkan kelewatan yang ketara di pihak pencelah yang dicadangkan. F G

[17] Lest we lose sight of matters in the light of the legal arguments, we should remember that, first and foremost, Etiqa's application is basically in essence an application for leave to intervene and made pursuant to O. 15 r. 6 Rules of Court 2012 hereinafter referred to as "ROC") which provides as follows: H

> Misjoinder and non-joinder of parties (O. 15 r. 6)
>
> 6(1) A cause or matter shall not be defeated by reason of the misjoinder or non-joinder of any party, and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter. I

(2) Subject to this rule, at any stage of the proceedings in any cause or matter, the Court may on such terms as it thinks just and either of its own motion or on application:

(a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;

(b) order any of the following persons to be added as a party, namely:

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the Court, would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

(3) An application by any person for an order under paragraph (2) adding him as a party shall, except with the leave of the Court, be supported by an affidavit showing his interest in the matters in dispute in the cause or matter or, as the case may be, the question or issue to be determined as between him and any party to the cause or matter.

(4) A person shall not be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.

[18] The test to be adopted in determining an application of this nature was elucidated by the Privy Council in *Pegang Mining Company Ltd v. Choong Sam & Ors* [1968] 1 LNS 96; [1969] 2 MLJ 52. In this case, Pegang Mining Co Ltd (hereinafter referred to as "Pegang") was granted mining leases from the State of Perak over four parcels of land. Pegang in turn, sub-let the leases to a sub-lessee called Ho Man. Dissatisfied with the manner in which the sub-lessee was working on the lands, Pegang entered into a tripartite agreement on 22 October 1931 (hereinafter referred to as "1931 agreement") involving Pegang, the sub-lessee and a Ho Kok Yew. By this agreement, Ho Kok Yew became a sub-sub-lessee as the agreement provided that the sub-lessee should grant sub-sub leases to the parcels of land to Ho Kok Yew. On 1 July 1963, the personal representative of the sub-sub-lessee called Tong Swee King entered into a written contract with a Choong Sam permitting Choong Sam to work on the lands in return for a payment of tribute. This was an annual contract and was renewed on 27 July 1964. In another agreement executed in 1964, which took the form of a letter, the sub-sub-lessee undertook to secure from Pegang the rights to mine on the land as agreed in the 1931 agreement.

[19] Subsequent to that, Pegang managed to secure mining leases of several new parcel of lands. Pegang refused to grant sub-lease of the new lands to the sub-lessees and this refusal ultimately compromised Choong Sam's interests as he held the rights to mine the lands due to his agreement with Tong Swee King, the sub-sub lessee. On Choong Sam's request, Tong Swee King instituted an action at the High Court premised on the grounds that the 1931 agreement obligated Pegang to grant the sub-lease and thereafter the sub-lessee was obligated to grant a sub-sub-lease to Tong Swee King. The High Court dismissed the action and Tong Swee King filed an appeal against the High Court decision.

[20] In view of the letter cum contract of 27 July 1964, Choong Sam's interests were very much dependant on the High Court action brought by the sub-sub-lessee for if her action should fail, Choong Sam would not be able to continue to work the mines. A material term agreed to by Choong Sam and the sub-sub-lessees on 12 July 1963 was that Choong Sam would bear all the costs that the sub-sub-lessee would incur in the enforcement of her rights under the 1931 agreement (in either arbitration or litigation). It was also agreed between these two parties (Choong Sam and the sub-sub-lessee) that the final decision whether or not to appeal against any order of the court arising from the litigation or appeal should lie with Choong Sam.

[21] When the High Court dismissed the sub-sub-lessee's action, she duly filed a notice of appeal to the Federal Court. However, against the express instructions of Choong Sam, the sub-sub-lessee elected to withdraw the said appeal and fully and completely discharged Pegang from all liabilities due toward her in exchange for a sum of RM10,000. Following this, the sub-sub-lessee discontinued her appeal at the Federal Court.

[22] As a result of this, Choong Sam filed a notice of motion at the Federal Court for an order that either he or the sub-lessee be substituted as the appellant in the appeal and the sub-sub-lessee be added as a respondent. Choong Sam's notice of motion was allowed by the Federal Court resulting in the appeal to the Privy Council. The issue to be determined by the Privy Council was in relation to the substitution of the parties.

[23] In delivering the judgment of the Privy Council, Lord Diplock held (at p. 56):

> A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?

[24] Section 96 of the Road Transport Act 1987 imposes upon Etiqa the liability to satisfy any monetary judgment which the third respondent may secure. The said provision reads as follows:

Duty of insurers to satisfy judgements against persons insured in respect of third party risks

96. (1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

(2) No sum shall be payable by an insurer under subsection (1):

(a) in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the proceedings;

(b) in respect of any judgment, so long as execution is stayed pending an appeal; or

(c) in connection with any liability, if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability the policy was cancelled by mutual consent or by virtue of any provision contained therein and either:

(i) before the happening of the said event the certificate was surrendered to the insurer or the person to whom the certificate was delivered made a statutory declaration stating that the certificate had been lost or destroyed;

(ii) after the happening of the said event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer or the person to whom the certificate was delivered made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the said event, but within the said period of fourteen days, the insurer has commenced proceedings under this Part in respect of the failure to surrender the certificate.

(3) No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has

given notice to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

(4) If the amount which an insurer becomes liable under this section to pay in respect of a liability of a person insured by a policy exceeds the amount for which he would, apart from this section, be liable under the policy in respect of that liability, he shall be entitled to recover the excess from that person.

(5) In this section, the expression – material – means of such a nature as to influence the judgement of a prudent insurer in determining whether he will take the risks, and if so at what premium and on what conditions, and the expression – "liability covered by the terms of the policy" means a liability but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.

(6) In this Part, reference to a certificate of insurance in any provision relating to the surrender or the loss or destruction of a certificate of insurance shall, in relation to policies under which more than one certificate is issued, be construed as references to all the certificates and shall, where any copy has been issued of any certificate, be construed as including a reference to that copy.

[25] I find *Johannes Koplan v. Aw Chen* [1970] 1 LNS 42, [1970] 1 MLJ 220b illuminating in determining whether or not Etiqa should be allowed to intervene. In delivering the decision of the Federal Court, Ong CJ (Malaya) had referred to the following passage of *Gurtner v. Circuit* [1968] 2 QB 587:

... As Diplock LJ (as he then was) said, at p. 602:

> Clearly the rules of natural justice require that a person who is to be bound by a judgment in an action brought against another party and directly liable to the plaintiff upon the judgment should be entitled to be heard in the proceedings in which the judgment is sought to be obtained. A matter in dispute is not, in my view, effectually and completely 'adjudicated upon' unless the rules of natural justice are observed and all those who will be liable to satisfy the judgment are given an opportunity to be heard. In the case of an ordinary insurer, this does not arise in practice, since the standard terms of a third party liability policy give to the insurer a contractual right to conduct the defence of the running-down action in the name of the assured. But as I read his judgment in the *Fire Auto & Marine* case, [1964] 2 QB 687 John Stephenson J would have allowed an ordinary insurer to be added as a party to a running-down action if the policy of insurance did not contain such a term. And this, I think, would be right.

> I do not think the rules of natural justice depend upon a technicality as to the procedure by which the liability of a person who is bound to satisfy the judgment obtained by the plaintiff in the running-down action is enforceable. So long as it is legally enforceable against that person either directly by the plaintiff or indirectly by the Minister for the plaintiffs benefit under such a contract as exists in the present case, the Court has jurisdiction to add that person as a party and ought normally to exercise its discretion by granting his application to be added. I think, therefore, that the bureau is entitled to be added as a party to the present action.

[26] Having referred to the above passage, Ong CJ (Malaya) had this to say:

> Compulsory insurance against third party risks has made alterations in the common law whereby insurers are made directly liable to satisfy judgments against their insured. The negligent driver is only the nominal defendant, whereas the party injuriously affected by an award of damages is the insurer by and in whose interests the action should be defended.

[27] Gurtner (*supra*) was also referred to by the Supreme Court in *Arab Malaysian Merchant Bank Bhd v. Dr Jamaludin Dato' Mohd Jarjis* [1991] 2 CLJ 862; [1991] 1 CLJ (Rep) 19 where Gunn Chit Tuan SCJ (as he then was) held (at p. 863)

> ... The scope of the present rule, so far as concerns the joinder of persons not parties has been significantly extended by the addition of para. 2(b)(ii) which is as follows:
>
> > (2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application:
> >
> > (b) order any of the following persons to be added as a party, namely:
> >
> > (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;
>
> One of the class of cases covered by the said rule, which allows intervention by persons not parties, is where the proprietary or pecuniary rights of the intervener are directly affected by the proceedings or where the intervener may be rendered liable to satisfy any judgment either directly or indirectly. The ambit of this class has been materially widened by the decision of the U.K. Court of Appeal in *Gurtner v. Circuit* [1968] 1 All ER 328, the effect of which is to include any case in which the

intervener is directly affected not only in his legal rights but in his pocket. In this connection, we would refer to and respectfully adopt the following *dictum* of Lord Denning MR, in that case, in which His Lordship said as follows:

> It seems to me that, when two parties are in dispute in an action at law and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the Court in its discretion may allow him to be added as a party on such terms as it thinks fit. By so doing, the Court achieves the object of the rule. It enables all matters in dispute 'to be effectually and completely determined and adjudicated upon' between all those directly concerned in the outcome.

[28] In the light of the aforesaid precedents, *Pegang Mining* (*supra*), *Johannes Koplan* (*supra*) and *Arab Malaysian Merchant Bank Bhd* (*supra*), in my judgment Etiqa should be permitted to intervene in the Magistrate Court action. My finding is fortified by the arguments raised by both En Tom Chin, learned counsel for Etiqa, and En Tanzil.

[29] En Chin submits that if Etiqa's suspicions of the fraudulent collusion are indeed true, then it is most likely that the first and second respondents will not, at the trial, raise the issue pursued by Etiqa which is that the car was not involved in the third respondent's accident. En Tanzil concedes that Etiqa is the paymaster as regards his firm's appointment as the solicitors for the first and second respondents. Nonetheless, En Tanzil submits that there is no way in which he can safeguard Etiqa's interests as his primary duty is to the first and second respondents and not to Etiqa. In addition to that, even if he were to find that there is evidence at the trial to show that there is fraudulent claim of collusion between the respondents, he is legally estopped from cross-examining his own witnesses.

[30] In the light of the submissions made, I find that it is clear that Etiqa's legal interests will be severely compromised if it is not allowed to intervene at the trial. The learned Magistrate committed a clear error when she concluded that Etiqa would suffer no prejudice if encl. 10 were to be dismissed.

[31] I will now turn to the issue whether or not I should depart from the legal principles on intervention by reason of the fact that the matter before me relates to an insurance policy.

[32] I shall proceed to discuss the case of *Badruzamani*. Although En Manoharan had submitted that *Badruzamani* is binding on me as it was affirmed by the Court of Appeal, he had not produced a decision or order of the Court of Appeal to substantiate his submissions. Accordingly, I am of the view that I am not bound by *Badruzamani* which is a decision of a court of co-ordinate decision.

[33] It is also pertinent to note that in *Badruzamani*, in coming to the conclusion about the insurer's right to intervene, the learned judge had relied on *Carpenter v. Ebblewhite & Ors* [1939] 1 KB 347. I find *Carpenter* (*supra*) factually distinguishable. The plaintiffs in *Carpenter* too suffered injuries in a collision. However, they had mounted different causes of actions against the defendants. The case against the driver and the registered owner was for damages premised on negligence. The plaintiffs had also sought a declaration against the insurers that the insurers were obliged to satisfy any judgment which the plaintiffs may secure against either or both the driver and the registered owner.

[34] In dealing with the plaintiffs' prayer for the declaration, the English Court of Appeal held that it was premature to grant the declaration for the plaintiffs' right to this remedy had yet to be crystallised as the plaintiffs had yet to secure in their favour a judgment entitling them to damages. Thus, I find it inappropriate to rely on *Carpenter* and consequentially *Badruzamani* in an application for leave to intervene.

[35] I find that in determining En Manoharan's submissions on the issue of procedure as set out in para. 9 above, it is necessary to consider the circumstances under which the insurer seeks to avoid its liability. In *Arnanda* (*supra*) (which En Manoharan seeks to rely on in support of his submission), the insurer had invoked s. 96(3) of the Road Transport Act 1987 to secure a declaratory order to nullify the insurance policy premised on fraud in the Kuala Lumpur High Court. The insurer failed to give notice of the pending action for the declaration despite being aware of the claim which the respondent had filed at the Kulim Magistrate's Court. The issue before the Court of Appeal was whether or not the declaration could be sustained in view of the insurer's failure to give notice. Thus, *Arnanda* is clearly not a relevant precedent for the instant appeal.

[36] A distinction must be made in an instance in which the insurer alleges that it is not liable under the insurance policy on the grounds that had it not been for the fraud perpetuated against it, it would not have issued the policy. Under such circumstances, the proper mode for the insurer to move the court would be to file a writ or an originating summons to seek a declaration to nullify the policy. The action should be separate as the witnesses to be called to establish the fraud would constitute witnesses who are not acquainted to the facts of the collision.

[37] However, in the instant case, the insurer concedes that there is a valid policy subsisting. But it is seeking to avoid liability on the grounds that there is a fraud in relation to the "happening" of the accident. Etiqa can only establish this purported fraud through the witnesses to the collision. If Etiqa is not permitted to intervene in the trial, Etiqa would have to file a fresh action against the same parties and this would result in a multiplicity/duplicity of actions apart from incurring extra costs to the parties.

[38] I also find that the learned Magistrate had erroneously imposed an excessively high burden of proof on Etiqa in an O. 15 application when she dismissed encl. 10 on the following ground:

> Mahkamah juga mendapati tiada sebarang isu-isu lain yang meragukan atau terdapatnya penipuan 'fraud' yang jelas yang dibangkitkan oleh pemohon. Permohonan ini dibuat tidak berdasarkan pembuktian khusus. Laporan penyelaras yang dikatakan hasil siasatan penyelaras yang membangkitkan isu fraud juga tidak diekshibitkan di dalam permohonan ini untuk menerangkan apakah isu penipuan yang ingin dibangkitkan oleh pemohon. Maka jelas menunjukkan isu fraud yang dikatakan hanyalah kenyataan kosong semata-mata.

This issue of whether or not there is evidence of the fraud should be determined at the conclusion of the trial after an assessment of the witnesses' credibility has been made.

[39] In the final analysis, although an appellate court should be slow to interfere with the exercise of the discretionary power of the court below from the reasons above, I find that there are compelling grounds for me to interfere (*Public Bank Bhd v. Nikseng Development Sdn Bhd* [1997] 3 CLJ 381, *Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd* [1992] 1 CLJ 20; [1992] 1 CLJ (Rep) 150 followed).

[40] Accordingly, the appeal is allowed with agreed costs of RM1,000. It is ordered that the decision of the learned Magistrate is set aside and that the appellant is granted leave to intervene in the Sungai Petani Civil Action KB-A73KJ-175-2-2020.